

1 HONORABLE BENJAMIN H. SETTLE
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 DINAH CANADA, MARIE JOHNSON-
11 PEREDO and ROBERT HEWSON on behalf
12 of themselves and all others similarly situated,

13 Plaintiffs,

14 v.

15 MERACORD, LLC; LINDA REMSBERG and
16 CHARLES REMSBERG, individually and on
behalf of the marital community; LLOYD E.
17 WARD and AMANDA GLEN WARD,
individually and on behalf of the marital
community; LLOYD WARD, P.C.; LLOYD
18 WARD & ASSOCIATES, P.C.; THE LLOYD
WARD GROUP, P.C. (D/B/A LLOYD
WARD GROUP II); WARD HOLDINGS,
19 INC.; and SETTLEMENT COMPLIANCE
COMMISSION, INC.,

20 Defendants.

21 NO. 3:12-CV-05657-BHS

22 **THE MERACORD DEFENDANTS'
MOTION TO DISMISS FOR LACK OF
SUBJECT-MATTER JURISDICTION,
WITH INCLUDED MEMORANDUM OF
LAW**

23 **NOTE ON MOTION CALENDAR:**
May 24, 2013

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MERACORD DEFENDANTS' MOTION TO DISMISS FOR
LACK OF SUBJECT-MATTER JURISDICTION, WITH
INCLUDED MEMORANDUM OF LAW

A n d r e w s ■ S k i n n e r , P . S .
645 Elliott Ave. W., Ste. 350
Seattle, WA 98119
Tel: 206-223-9248 ■ Fax: 206-623-9050

1 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Meracord, LLC, Charles
 2 Remsberg, and Linda Remsberg (collectively, the "Meracord Defendants") respectfully move to
 3 dismiss the claims of Plaintiff Johnson-Peredo for lack of subject-matter jurisdiction.

4 On April 16, 2013, the Supreme Court issued its decision in *Genesis Healthcare Corp. v.*
 5 *Symczyk*, 133 S. Ct. 1523 (2013), which addressed offers of judgment pursuant to Federal Rule
 6 of Civil Procedure 68. The *Genesis* court held that, where a named plaintiff's individual claim
 7 has been mooted by an offer of judgment, the class action also has been mooted, unless certain
 8 narrow exceptions apply. *See* 133 S. Ct. at 1530-32. These exceptions do not apply here.

9 On April 25, 2013, the Meracord Defendants served offers of judgment under Rule 68
 10 (the "Offers of Judgment") on Johnson-Peredo and the other named Plaintiffs for the full value of
 11 their individual damages claims, as well as reasonable attorneys' fees, costs, and expenses. *See*
 12 Decl. of C. Allen Garrett Jr., Exhibits A, B, & C.¹ As of the date of this filing, the time to
 13 respond to the Offers of Judgment has not expired. *See* Fed. R. Civ. P. 68 (allowing responding
 14 party 14 days to accept offer of judgment). Nevertheless, because service of the Offer of
 15 Judgment to Johnson-Peredo moots her claims even if she rejects it, the Meracord Defendants
 16 respectfully move to dismiss her claims for lack of subject-matter jurisdiction.

17 **I. RELEVANT BACKGROUND**

18 In the Amended Complaint, Johnson-Peredo alleges individual damages consisting of
 19 (a) \$3,352.82 in fees she paid to Defendants in connection with her alleged debt settlement
 20 program; and (b) \$1,000 she alleges to have paid to an attorney to defend an action filed against
 21 her by Discover. Am. Compl. ¶ 196. The Offer of Judgment to Johnson-Peredo is "for the sum

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23 ¹ Although litigation of the claims of Plaintiffs Canada and Hewson has been stayed pending resolution of the appeal
 24 in *Rajagopalan*, counsel for the Meracord Defendants is making the Court aware of these intervening events
 25 immediately, in light of counsel's duty "to bring to the federal tribunal's attention, '*without delay*,' facts that may
 raise a question of mootness." *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (emphasis in
 original). Counsel also will notify the Ninth Circuit of these events in the pending appeals involving Plaintiffs
 Canada and Hewson. If the Court rules that Plaintiff Johnson-Peredo's claims are moot it may be appropriate to lift
 the stay to address the identical issues relative to the claims of Plaintiffs Canada and Hewson.

1 of \$13,058.46, plus reasonable attorneys' fees, costs, and expenses, in full satisfaction of all
 2 damages and relief sought by Ms. Johnson-Peredo on her individual claims in this action."
 3 Garrett Decl., Ex. A at 2. This Offer represents the full value of Johnson-Peredo's individual
 4 damages claims (trebled), plus reasonable litigation expenses.

5 The Meracord Defendants' Offers of Judgment to Canada and Hewson likewise are "in
 6 full satisfaction of all damages and relief sought" by them individually. *Id.*, Ex. B at 2; Ex. C at
 7 2. The Offer of Judgment to Canada is "for the sum of \$27,608.00, plus reasonable attorneys'
 8 fees, costs, and expenses, in full satisfaction of all damages and relief sought by Ms. Canada on
 9 her individual claims in this action. *Id.*, Ex. B at 2. The Offer of Judgment to Hewson is "for the
 10 sum of \$16,075.50, plus reasonable attorneys' fees, costs, and expenses, in full satisfaction of all
 11 damages and relief sought by Mr. Hewson on his individual claims in this action." *Id.*, Ex. C at
 12 2.

13 **II. ARGUMENT AND CITATION TO AUTHORITY**

14 **A. General Mootness Standards**

15 Article III § 2 of the U.S. Constitution restricts the jurisdiction of the federal courts to
 16 "Cases" and "Controversies," and limits "the authority of federal courts to resolving 'the legal
 17 rights of litigants in actual controversies.'" *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct.
 18 1523, 1528 (2013) (quoting *Valley Forge Christian College v. Americans United for Separation
 19 of Church and State, Inc.*, 454 U.S. 464, 471 (1982)). "In order to invoke federal-court
 20 jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or
 21 'personal stake,' in the outcome of the action." *Id.* (quoting *Summers v. Earth Island Institute*,
 22 555 U.S. 488, 493 (2009)). If at any point in the litigation a plaintiff receives complete relief and
 23 no longer has a "'personal stake in the outcome of the lawsuit,' . . . the action can no longer
 24 proceed and must be dismissed as moot." *Id.* (quoting *Arizonaans for Official English v. Arizona*,
 25 520 U.S. 43, 67 (1997)).

B. The Meracord Defendants' Offer of Judgment Moots Plaintiff Johnson-Peredo's Individual Claims

In *Genesis*, the Supreme Court held that where a named plaintiff's individual claims become moot prior to a ruling on class certification, the class action also is rendered moot, unless certain narrow exceptions apply. 133 S. Ct. at 1529-32. In so holding, the Court "assume[d] without deciding" that an offer of judgment in full satisfaction of a named plaintiff's individual claims moots the plaintiff's claims, whether or not the offer is accepted. *Id.* at 1529. Although the issue was not before the Court because the plaintiff had conceded her individual claim was mooted by the defendant's offer, the Supreme Court noted that "Courts of Appeals on both sides of the issue have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent." *Id.* at 1529 n.4 (citing *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004) (holding that unaccepted offer of judgment moots individual plaintiff's claim), and *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009) (holding court should enter judgment in favor of plaintiff where unaccepted Rule 68 offer of judgment satisfies plaintiff's entire demand)).

In the Ninth Circuit, a Rule 68 offer of judgment in full satisfaction of a plaintiff's claims moots the plaintiff's claims, even if the plaintiff rejects the offer. *See, e.g., Echlin v. Columbia Collectors, Inc.*, No. C12-5878 RBL, 2013 WL 858206, at *2-*3 (W.D. Wash. Mar. 7, 2013) (holding that an unaccepted offer of judgment for more than the named plaintiff's individual damages claim moots the action) (citing, *inter alia*, *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1131 (9th Cir. 2005)). Thus, whether or not Johnson-Peredo accepts the Offer of Judgment, her claims should be mooted. If Johnson-Peredo accepts the Offer of Judgment, judgment should be entered on her claims in accordance with the Offer of Judgment. Fed. R. Civ. P. 68(a). If she rejects the Offer of Judgment, her claims should be dismissed for lack of subject-matter jurisdiction.

C. Mooting the Named Plaintiff's Individual Claims Moots the Class Action, With Limited Exceptions

In a class action, there must be an "actual controversy" between the named plaintiff and the defendant. Therefore, mootting the claims of the named plaintiff generally renders the class action moot. *Board of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975). Although there are limited exceptions to this rule, these exceptions do not apply here.

First, in *Sosna v. Iowa*, 419 U.S. 393, 399 (1975), the Court held that satisfaction of the named plaintiff's individual claims *after* a motion for class certification has been granted does not render the class action moot. Once a class has been certified, "'the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by' the named plaintiff. *Genesis*, 133 S. Ct. at 1530 (quoting *Sosna*, 419 U.S. at 399-402). Here, class certification has not yet been granted.

Second, in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980), the Court "narrowly extended this principle to *denials* of class certification motions." *Genesis*, 133 S. Ct. at 1530 (emphasis in original). This ruling, however, merely addressed the situation where, "but for the district court's erroneous denial of class certification," the *Sosna* exception to mootness would have applied. *Id.* (citing *Geraghty*, 445 U.S. at 404 & n.11). Here, there has been no ruling denying class certification either.

Third, there is a narrow exception for "inherently transitory" class actions where the mooting event occurs before the class certification issue has been adjudicated. *Genesis*, 133 S. Ct. at 153-31 (discussing *Sosna*, *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)). In *Gerstein*, for example, the named plaintiffs' pretrial detention ended prior to a ruling on class certification. See *Genesis*, 133 S. Ct. at 1531. The *Gerstein* court found that, because pretrial detention is "by nature temporary," the case fit within the "narrow class of cases" in which satisfaction of a named plaintiff's claims prior to a class certification decision does not render the entire class action moot. 420 U.S. at 110 n.11.

1 As discussed below, the *Genesis* decision makes it clear that the "inherently transitory"
 2 exception does not apply where, as here, Johnson-Peredo and the other named Plaintiffs seek to
 3 recover only the monetary damages now satisfied by the Offers of Judgment.

4 **D. The *Genesis* Decision Holds the "Inherently Transitory" Mootness Exception
 5 Does Not Apply to Damages Class Actions Where the Named Plaintiff is
 6 Offered Full Individual Damages Before a Ruling on Class Certification**

7 In *Genesis*, the Supreme Court explained that the "inherently transitory" exception to
 8 mootness applies only where it is "'certain that other persons similarly situated' will continue to
 9 be subject to the challenged conduct and the claims raised are 'so inherently transitory that the
 10 trial court will not have enough time to rule on a motion for class certification before the
 11 proposed representative's individual interest expires.'" 133 S. Ct. at 1530-31 (quoting
 12 *McLaughlin*, 500 U.S. at 52). The *Genesis* court then held that the narrow "inherently transitory"
 13 exception to mootness should not apply to damages class actions where, as here, the defendant
 14 offers to fully satisfy the named plaintiff's claim prior to any ruling on class certification. 133 S.
 15 Ct. at 1531.

16 The Court explained that the "inherently transitory" exception "focused on the fleeting
 17 nature of the challenged conduct giving rise to the claim, not on the defendant's litigation
 18 strategy." *Id.* Unlike the claims for injunctive relief at issue in *Gerstein* and *McLaughlin* that
 19 otherwise might evade review, "a claim for damages cannot evade review; it remains live until it
 20 is settled, judicially resolved, or barred by a statute of limitations." *Id.*

21 The *Genesis* court explained that a defendant's tendering of full individual damages to a
 22 named plaintiff does not "insulate such a claim from review, for a full settlement offer addresses
 23 plaintiff's alleged harm by making the plaintiff whole." *Id.* Additionally, "[w]hile settlement
 24 may have the collateral effect of foreclosing unjoined claimants from having their rights
 25 vindicated in **respondent's** suit, such putative plaintiffs remain free to vindicate their rights in
 26 their own suit." *Id.* (emphasis in original).

1 The Supreme Court went on to question a purported policy rationale against allowing the
 2 use of offers of judgment to "pick off" individual plaintiffs prior to class certification. *Id.* at
 3 1531-32. Relying on *Deposit Guaranty National Bank, Jackson, Miss. v. Roper*, 445 U.S. 326
 4 (1980), several Courts of Appeals (including the Third Circuit) had held that satisfaction of a
 5 named plaintiff's individual claims prior to a ruling on class certification does not render the
 6 class action moot, under the theory that the defendant should not be allowed to "pick off" named
 7 plaintiffs in order to avoid class certification. *Id.* at 1531. The *Genesis* court explained that, in
 8 *Roper*, the named plaintiff maintained an "ongoing, personal economic stake" in appealing the
 9 denial of class certification, "namely, to shift a portion of attorney's fees and expenses to
 10 successful class litigants." *Id.* at 1532 (citing *Roper*, 445 U.S. at 332-34 & n.6).² It was only "in
 11 dicta" that the *Roper* court "underscore[d] the importance of a district court's class certification
 12 decision" and noted a potential concern with frustrating the objectives of class actions. *Id.*

13 The *Genesis* court ruled that *Roper* "turned on a specific factual finding that the plaintiffs
 14 possessed a continuing personal economic stake in the litigation, even after the defendants' offer
 15 of judgment." *Id.* The offer of judgment in *Genesis*, however, provided the named plaintiff with
 16 "complete relief on her individual claims," and the named plaintiff failed to assert "any
 17 continuing economic interest in shifting attorney's fees and costs to others." *Id.*

18 **E. The Impact of *Genesis* on Decisions of the Court of Appeals Extending the**
 19 **"Inherently Transitory" Mootness Exception to Damages Class Actions**

20 Prior to *Genesis*, several of the Courts of Appeals, including the Ninth Circuit and the
 21 Third Circuit (as described in the decision reversed in *Genesis*), had expanded the "inherently
 22 transitory" mootness exception to include damages class actions. *See, e.g., Pitts v. Terrible*

24 ² Because the Court distinguished *Roper* "on the facts," it did not address *Roper*'s continuing vitality in light of
 25 *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), which held that an "interest in attorney's fees is, of
 course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying
 claim." *See* 133 S. Ct. at 1532 n.5.

1 *Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (holding that the "inherently transitory"
 2 exception should not be limited to "cases involving *inherently* transitory claims," but should
 3 instead be extended to damages claims that are ""acutely susceptible to mootness' in light of [the
 4 defendant's] tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action")
 5 (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)); *Symczyk v. Genesis*
 6 *Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011) (following *Weiss* in holding that defendants could
 7 not "pick off" named plaintiffs by tendering the full amount of their individual damages claim,
 8 whether the collective action was brought under the Fair Labor Standards Act or Rule 23), *rev'd*,
 9 133 S. Ct. 1523 (2013). These decisions all relied on the very same Supreme Court decisions
 10 specifically analyzed in *Genesis* (*Sosna, Gerstein, Geraghty, Roper*, and *McLaughlin*). *See Pitts*,
 11 653 F.3d at 1087-92; *Symczyk*, 656 F.3d at 195-97; *Weiss*, 385 F.3d at 342-48.

12 The Supreme Court's decision in *Genesis*, however, confirms each of these decisions
 13 should be limited to their factual context: (1) *Sosna* should be limited to cases where class
 14 certification has been granted; (2) *Geraghty* should be limited to cases where class certification
 15 has been denied; (3) *McLaughlin* and *Gerstein* should be limited to injunctive relief cases where
 16 the challenged conduct was "inherently transitory"; and (4) *Roper* should be limited to cases
 17 where class certification has been denied and the named plaintiff retains an interest in appealing
 18 the denial in order to shift attorneys' fees and costs to others.

19 Although *Genesis* arose in the context of a collective action under § 216(b) of the Fair
 20 Labor Standards Act ("FLSA"), the authorities on which the Third Circuit had relied in finding
 21 that the class action claims were not moot – and which the Supreme Court found did not support
 22 a broad application of the "inherently transitory" relation-back doctrine – all arose in the Rule 23
 23 context. *See Sosna*, 419 U.S. 553; *Geraghty*, 455 U.S. 388; *Roper*, 445 U.S. 326; *McLaughlin*,
 24 500 U.S. 44; *Gerstein*, 420 U.S. 103. In holding these decisions did not support the Third
 25 Circuit's ruling, the Supreme Court discussed **both** the differences between § 216(b) and Rule 23

1 **and** the Third Circuit's reliance on Rule 23 cases that were, "by their own terms," distinguishable
 2 from the facts in *Genesis*. 133 S. Ct. at 1529. Thus, the holding and much of the analysis in
 3 *Genesis* apply to Rule 23 class actions. Under the Supreme Court's binding interpretation of its
 4 own precedent in *Genesis*, the only valid exceptions to the general rule that moots the named
 5 plaintiff's claim moots the class action involve either (a) mooted events occurring *after* a class
 6 certification ruling; or (b) injunctive relief claims that are "inherently transitory."

7 **F. Application of *Genesis* to This Case**

8 In this case, no class certification decision has been made. Furthermore, Johnson-Peredo
 9 and the other named Plaintiffs seek only monetary damages. Am. Compl. ¶ 295. The Meracord
 10 Defendants have served Rule 68 Offers of Judgment upon Johnson-Peredo and the other named
 11 Plaintiffs in full satisfaction of their individual damages claims, including reasonable attorneys'
 12 fees, costs, and expenses. Exs. A-C. Under *Genesis*, there is no applicable exception to the
 13 general rule that satisfaction of a named plaintiff's individual claims moots the class claims. *See*
 14 133 S. Ct. 1529-32. Accordingly, all of Plaintiff Johnson-Peredo's claims should be dismissed
 15 for lack of subject-matter jurisdiction.

1 **IV. CONCLUSION**

2 For the foregoing reasons, this Court should dismiss Plaintiff Johnson-Peredo's claims for
3 lack of subject-matter jurisdiction.

4 DATED this 30th day of April, 2013.

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6 PAMELA M. ANDREWS, WSBA #14248
7 JENNIFER LAUREN, WSBA #37914
8 ANDREWS ■ SKINNER, P.S.
9 645 Elliott Avenue West, Suite 350
10 Seattle, Washington 98119-3911
11 Pamela.Andrews@Andrews-Skinner.com
12 Jennifer.Lauren@Andrews-Skinner.com

5 s/ C. Allen Garrett Jr.
6 C. ALLEN GARRETT JR. (*pro hac vice*)
7 Georgia Bar No. 286335
8 KILPATRICK TOWNSEND
9 & STOCKTON LLP
10 1100 Peachtree Street, Suite 2800
11 Atlanta, Georgia 30309-4528
12 AGarrett@KilpatrickTownsend.com

13 *Attorneys for the Meracord Defendants*

CERTIFICATE OF SERVICE

I hereby certify that, on April 30, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/ C. Allen Garrett Jr.
C. ALLEN GARRETT JR. (*pro hac vice*)
Georgia Bar No. 286335
KILPATRICK TOWNSEND
& STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4528
AGarrett@KilpatrickTownsend.com

One of the Attorneys for the Meracord Defendants

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A n d r e w s ■ S k i n n e r , P . S .
645 Elliott Ave. W., Ste. 350
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Tel: 206-223-9248 ■ Fax: 206-623-9050